Supreme Court U.S.
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No. 00-1852

In The

Supreme Court of the United States

MARVIS JETT,

Petitioner,

v.

WASHINGTON COUNTY SCHOOL BOARD,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTIONS PRESENTED

1. Should this Court grant certiorari upon the ground that the Eleventh Circuit's opinion in this case, which determined in part that the continuous violation theory did not save some of Petitioner's otherwise time-barred claims, conflicts with case law from other circuits?

2. Should this Court grant certiorari upon the ground that the Eleventh Circuit's opinion in this case conflicts with *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977) and/or *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982) on the subject of whether a continuous violation was present in this case?

3. Should this Court grant certiorari upon the ground that the Eleventh Circuit's opinion in this case conflicts with *United States Postal Serv. Bd. v. Aikens*, 460 U.S. 711, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983) and/or *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) on whether, after a trial on the merits, it is proper for an appellate court to consider whether a plaintiff has established a prima facie case of discrimination under Title VII?

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STATEMENT OF THE CASE

The School Board wishes to clarify and expand upon the factual statement provided by its employee, Petitioner Marvis Jett. This case concerns the School Board's acts of transferring Jett three times and adopting the below-enumerated policy. Each fact below is supported by the record the Eleventh Circuit reviewed.

From 1967 to 1989, Jett was a secretary in the School Board's district office. In 1989, Jett was the only black secretary of the eight at work there. That year, School Superintendent Kelly Brock determined that the district office had too many secretaries. Therefore, Brock elected to transfer Jett to the district media center. The legitimate reason for this transfer was the alleviation of overstaffing in the district office.

When informed of this transfer, Jett told Superintendent Brock that he was discriminating against her. Jett threatened to file a lawsuit. Superintendent Brock then told Jett that, though she would be performing teachers' aide duties at the media center, Brock would allow Jett to retain her designation as secretary and higher secretary-level pay rate. This privilege had never before been afforded to any School Board employee. Other employees had been demoted and had their pay correspondingly reduced.

Jett worked at the media center for one year and did not enjoy her tenure there. Jett requested to be moved. Therefore, in August 1990, Jett was transferred from the media center to Chipley High School. The legitimate reasons for the transfer were that Jett was unhappy at the media center and Chipley High School needed help converting from manual to automated records. Jett continued

to perform teachers' aide duties at Chipley High School but was paid the higher pay afforded to secretaries. She also enjoyed working there, and termed Chipley High School "a loving environment."

In August 1992, Jett was transferred to Roulhac Middle School. The legitimate reason for this transfer was that Roulhac needed additional assistance with its in-school suspension program. There, Jett continued to perform teachers' aide duties but retained her higher secretary pay and benefits.

In 1993, the School Board was experiencing financial problems. The School Board became concerned with its informal practice (which began with Jett) of continuing to pay some demoted employees at their pre-demotion pay rate. This concern was prompted by a white male principal's potential retention of pay after his upcoming demotion to a teaching position – Principal Phil Flater would soon be retaining his $50,509 salary while serving in a $40,347 teaching position. Therefore, the following policy was proposed, noticed to the public and duly promulgated:

> Effective July 1, 1994 all employees who have been reassigned or who are reassigned (transferred) to a position with lower pay will be paid on the salary schedule commensurate with the position to which they are assigned.

The legitimate reason for this policy was to save money.

Jett was affected by this policy – her salary was reduced by about $4600 per year to reflect her teachers' aide position. In other words, she was no longer paid

secretary salary and benefits for performing the duties of a teachers' aide.

Jett's Petition for Writ of Certiorari contains a recurring misstatement of fact regarding this "commensurate salary policy." Contrary to her assertion,[1] Jett was not the only person affected by this policy. Principal Flater was affected. Another white male, Calvin Stephenson, had his salary reduced by $2100 commensurate with his previous transfer from middle school principal to elementary school principal. This policy also affected Jerry Tyre, a white male who was transferred from Director of Transportation to teacher and suffered an $8600 pay reduction. All told, this policy saved the School Board over $20,000 in the first year of its application.

Jett's Petition contains another misstatement regarding the policy. Jett asserts that Jerry Tyre's salary remained the same even though he was demoted after the enactment of the commensurate salary policy. (Jett's Petition at 6). This is untrue and not supported by the record evidence. In fact, a School Board representative specifically testified at trial that Tyre was reassigned from the high school principal position to the lower-paying director of transportation position, and then subsequently to

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[1] Jett asserts that the School Board "admitted that of the six white employees it advanced to demonstrate reductions due to the salary policy just as Jett, that all of them could not attribute their salary reductions to the policy in question." (Jett's Petition at 6). The School Board did not admit that. The School Board has steadfastly maintained (and the Eleventh Circuit agreed) that at least three white males were affected by this policy in addition to Jett. In fact, Jett was the only black person affected by this policy.

the lower-paying position of teacher, and accordingly suffered an associated $9000 pay reduction.

Following her reduction in pay, Jett filed state administrative proceedings against the School Board on July 27, 1994, claiming that the School Board violated Title VII by intentionally discriminating against Jett on the basis of her race when it transferred her in 1989, 1990 and 1992 and when it passed and implemented the commensurate salary policy. This charge was found to be without merit by the Florida Commission on Human Relations ("FCHR").

Thereafter, Jett filed the instant lawsuit in the state courts of Florida. The School Board removed the matter to the United States District Court for the Northern District of Florida. On June 23, 1999, the School Board moved for summary judgment on the grounds that (1) Jett's failure to timely file an administrative complaint with the FCHR barred her claims of racial discrimination pertaining to her transfers, (2) Jett failed to demonstrate a prima facie case of racial discrimination, and (3) Jett did not demonstrate that the School Board's proffered legitimate reasons for its actions were pretexts for discrimination. The School Board's motion for summary judgment was denied by the court on the ground that genuine issues of fact remained. The court did not identify the issues of fact or provide any other legal basis for its decision.

Thereafter, this matter was tried to a jury. The School Board's motions for directed verdict after the presentations of Jett's and the School Board's cases were denied. On October 20, 1999, the jury returned a verdict for Jett in the amount of $134,000. The School Board's motion for

judgment notwithstanding the verdict was denied as well.

The School Board filed a timely notice of appeal. On appeal, the School Board argued to the United States Court of Appeals for the Eleventh Circuit in part that (1) the School Board's motion for summary judgment should have been granted because Jett's claims regarding her transfers were barred by the applicable statute of limitations, (2) the School Board motion(s) for directed verdict should have been granted because Jett did not establish a prima facie case regarding the transfers or the commensurate salary policy, (3) the School Board's motion(s) for directed verdict should have been granted because Jett did not show that the School Board's proffered legitimate reasons for transferring Jett and enacting the commensurate salary policy were mere pretexts for intentional racial discrimination.

In response, Jett argued that, though her administrative complaint was untimely filed as to the transfers, the equitable tolling and continuous violation doctrines saved Jett from the statute of limitations bar. She also argued that there was sufficient evidence in the record to justify the denial of the School Board's motion(s) for directed verdict on the issues of prima facie case and proof of pretext.

The Eleventh Circuit held that the School Board's motion for summary judgment should have been granted as to Jett's transfers because Jett filed state administrative proceedings more than 300 days after the transfers. 42 U.S.C. § 2000e-5(e). The court did not agree that the equitable tolling or continuous violation doctrines saved

the claims regarding the transfers. Furthermore, the Eleventh Circuit held that the School Board's motion for directed verdict should have been granted as to Jett's claim regarding the commensurate salary policy because Jett failed to prove a prima facie case of discrimination. Specifically, the court held that Jett had failed to prove that the commensurate salary policy did not affect similarly-situated white persons. The court further held that even if Jett had proved the elements of her prima facie case, her claim as to the commensurate salary policy must still fail because she did not prove that the School Board's proffered legitimate reason for the policy was a pretext for intentional racial discrimination. (See Eleventh Circuit Opinion in Jett's Petition at A-11).

Having thus ruled that Jett's transfer-related claims were barred by the statute of limitations and Jett's claims regarding the commensurate salary policy were unproved, the Eleventh Circuit reversed the district court judgment and remanded the case with instructions to dismiss Jett's case with prejudice. Jett's petition for rehearing en banc was denied, as was Jett's motion to stay the Eleventh Circuit's mandate while she petitioned this Court. Therefore, the United States District Court for the Northern District of Florida dismissed Jett's case with prejudice. Jett now requests this Court hear her case.

REASONS FOR DENYING THE WRIT

Jett apparently seeks a writ of certiorari pursuant to United States Supreme Court Rule 10(a), which indicates the Court's willingness to consider granting certiorari

when a United States court of appeals enters a decision that conflicts with a decision of another United States court of appeals or a decision of this Court.

Jett's Petition should be denied because the Eleventh Circuit properly reviewed the evidence adduced at trial and properly determined that some of Jett's claims were barred and others were unproven. The Eleventh Circuit's opinion in this action does not conflict with or ignore case law from this Court or from other circuits on any of the subjects presented by Jett.

In addition, Jett's claim that case law from this Court prohibits the appellate court from considering whether Jett established a prima facie case must be denied because, even if Jett is correct, the Eleventh Circuit reached the ultimate issue of discrimination when it ruled that Jett failed to prove that the School Board's proffered legitimate reasons for its action were a pretext for intentional racial discrimination.

Furthermore, Jett's argument to this Court that the Eleventh Circuit should not have addressed whether she proved a prima facie case was not presented to the Eleventh Circuit and therefore should not be reviewed by this Court.

I.

THE ELEVENTH CIRCUIT'S OPINION DOES NOT CONFLICT WITH CASE LAW FROM OTHER CIRCUITS REGARDING THE CONTINUING VIOLATION DOCTRINE.

In subsection I of her Petition, Jett argues that the Eleventh Circuit's opinion demonstrates confusion and lack of uniformity among the circuits regarding the application of the continuing violation theory and the elements necessary to satisfy the associated test. However, the Eleventh Circuit's opinion, which impliedly found that no continuing violation existed, is in full accord with case law from every other circuit in the nation.

It is undisputed that Jett's state administrative proceedings were timely instituted with respect to the commensurate salary policy. The question for the Eleventh Circuit was whether the continuous violation doctrine acted to allow adjudication of Jett's transfers, all of which occurred substantially outside the 300-day statutory time frame. 42 U.S.C. § 2000e-5(e).

To determine whether a continuous violation exists, the Eleventh Circuit utilizes the three-part test expressed first by the Fifth Circuit in *Berry v. Board of Supervisors of L.S.U.*, 715 F.2d 971 (5th Cir. 1983). *Roberts v. Gadsden Mem. Hosp.*, 835 F.2d 793, 800 (11th Cir. 1988) (adopting *Berry* test for use in Eleventh Circuit). There are three prongs to the *Berry* determination of whether time-barred acts have a substantial nexus to the act falling within the statutory time period: (1) whether the acts are related by subject matter, (2) whether the acts are isolated and discrete or occur with some frequency or repetition, and (3)

whether the acts are of sufficient permanence to trigger the plaintiff's awareness of her need to assert her rights. *Berry*, 715 F.2d at 981.

In recently adopting the *Berry* test, the First Circuit noted that, allowing for variations in language, the three-prong *Berry* test utilized in the Fifth and Eleventh Circuits is the same test adopted in a majority of other circuits. *O'Rourke v. City of Providence*, 235 F.3d 713, 731 (1st Cir. 2001) (listing cases utilizing *Berry*-like analysis). This statement is supported by an examination of case law from the other circuits. *See, e.g. West v. Philadelphia Elec. Co.*, 45 F.3d 744, 755 n.9 (3d Cir. 1995); *Bell v. Chesapeake & Ohio Ry. Co.*, 929 F.2d 220, 223-25 (6th Cir. 1991); *Selan v. Kiley*, 969 F.2d 560, 566-67 (7th Cir. 1992); *Mascheroni v. Board of Regents of Univ. of Cal.*, 28 F.3d 1554, 1561 (10th Cir. 1994). Other circuits, while not expressly adopting the *Berry* test, employ similar standards to determine whether the continuing violation doctrine applies. *O'Rourke*, 235 F.3d at 731 (citing *Van Zant v. KLM Royal Dutch Airlines*, 80 F.3d 708, 713 (2d Cir. 1996) (instances of discrimination must be "specific and related" and plaintiff must be without notice of discriminatory nature of events when they occur); *Curry v. District of Columbia*, 195 F.3d 654, 661 n.14 (D.C. Cir. 1999) (rejecting continuing violation claim because conduct within statutory period not sufficiently similar to conduct without). It is thus clear that the circuits are in agreement on the appropriate test to be administered when determining whether a continuing violation exists.[2]

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[2] While it does appear that the Ninth Circuit has recently rejected the *Berry* analysis, it has done so only in the context of

In an attempt to find inter-circuit conflict where none exists, Jett repeatedly misstates the law of continuing violation. For instance, Jett states that the Eleventh Circuit uses the three-prong *Berry* analysis but that "other circuits continue to require . . . that one definable incident of discrimination occurred within the relevant filing period, to invoke the continuing violation theory." (Jett's Petition at 10). This is no conflict. The Eleventh Circuit requires that a definable incident of discrimination occur within the relevant filing period. *Roberts*, 835 F.2d at 800. The very nature of the continuing violation doctrine expressed in *Berry* is to allow adjudication of time-barred claims if they have a sufficient nexus with an act falling within the filing period. If a plaintiff cannot prove that at least one discriminatory act fell within the filing period, the determination of substantial nexus will not be made.

Jett then asserts that she would have prevailed if the Eleventh Circuit had applied the Ninth Circuit's "test" because she began administrative proceedings within 300 days of the application of the commensurate salary policy. (Jett's Petition at 10-11). However, for various reasons, she would not have prevailed.

First, Jett's statement, quoted above, is not the Ninth Circuit's test for continuous violation. It is merely one implicit portion of every test for continuous violation, however phrased.

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hostile work environment claims. *Fielder v. UAL Corp.*, 218 F.3d 973, 988 (9th Cir. 2000). The instant case is not a hostile work environment case. Therefore, Jett cannot reasonably argue that the Ninth Circuit's analysis in *Fielder* would have created a different result in this case.

Second, Jett's proof fails under the Ninth Circuit's actual test for a continuing violation. In that circuit, one may prove a continuing violation in one of two ways. One might prove a serial violation, which is a series of sufficiently related acts beginning before and continuing into the limitations period. *Morgan v. National R.R. Passenger Corp.*, 232 F.3d 1008, 1015 (9th Cir. 2000). This serial violation analysis is essentially the *Berry* analysis – the court is asked to determine whether a sufficient nexus exists between time-barred and timely claims. Otherwise, a plaintiff in the Ninth Circuit must prove a systemic violation, which is a systemic company-wide policy or practice of discrimination. *Id.* at 1015-16. This systemic violation analysis is not at issue in this lawsuit, which concerns allegations that discrete acts were discriminatory. In either case, the plaintiff must prove that the violation continued into the limitations period. *Id.* at 1016.

Jett fails under this Ninth Circuit test (and the test of every other circuit) because she never proved that any discriminatory act fell within the filing period. Only the commensurate salary policy fell within the filing period. Jett did not prove that the commensurate salary policy was a discriminatory act that violated Title VII. The Eleventh Circuit explicitly determined that Jett failed to establish a prima facie case as to the policy and failed to prove that the School Board's proffered legitimate reason for its passage was a pretext for intentional discrimination. Without a discriminatory act *within* the filing period, Jett has no continuing violation extending *into* the filing period. Her claims are time-barred.

To further find inter-circuit conflict where none exists, Jett apparently argues, using *Place v. Abbott Laboratories*, 215 F.3d 803 (7th Cir. 2000) as support, that the Seventh Circuit utilizes a different evaluation when determining whether a continuing violation exists. (Jett's Petition at 12). However, *Place* does not enumerate three different tests for a continuing violation; it simply lists three scenarios in which continuing violations typically manifest themselves. This is made clear by the language in Jett's Petition. In fact, the Seventh Circuit also utilizes the familiar three-prong *Berry* analysis. *Selan v. Kiley*, 969 F.2d 560, 566-67 (7th Cir. 1992). Perhaps this is why Jett does not argue that she would have prevailed under Seventh Circuit case law.

In summary, federal law regarding continuing violation doctrine is clear among the circuits. Every circuit requires a discriminatory act to have occurred within the filing period. The vast majority of circuits expressly utilize the *Berry* three-prong analysis, the crux of which is a substantial nexus between the time-barred acts and the ãct(s) falling within the limitations period. The remaining circuits, though perhaps not expressly adopting *Berry*, unanimously require the same substantial nexus. This is true in the Ninth Circuit, where the court has simply chosen to explain the continuing violation doctrine by enumerating two types of continuing violations. The opinion in this matter would not have been different in any other circuit. With no conflict among the circuits, this Court should deny Jett's petition for writ of certiorari.

II.

THE ELEVENTH CIRCUIT'S OPINION DOES NOT CONFLICT WITH CASE LAW FROM THIS COURT REGARDING THE CONTINUING VIOLATION DOCTRINE.

Contrary to Jett's assertion, the Eleventh Circuit's opinion in this case does not conflict with *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977), or *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982) on the subject of the continuing violation and equitable tolling doctrines.

Jett argues that the Eleventh Circuit ignored *Evans* by failing to address whether any present violations existed. (Jett's Petition at 13). Jett asserts that the Eleventh Circuit refused to address the significance of the alleged current violation (i.e., the commensurate salary policy). Jett is incorrect. The Eleventh Circuit specifically addressed whether there existed a current violation – it held that no current violation existed because Jett did not prove a prima facie case of discrimination regarding the commensurate salary policy and did not prove that the School Board's legitimate reason for the policy was a pretext for intentional racial discrimination. (Eleventh Circuit Opinion in Jett's Petition at A-10).

Jett then argues that the Eleventh Circuit's opinion conflicts with *Zipes*. Apparently, Jett is now addressing equitable tolling theory and asserting that her transfers did not put her on notice that she had a claim against the School Board. This raises numerous counterarguments.

First, not only would Jett's transfers have placed a reasonable person on notice of the possibility of a claim,

but they directly and personally placed her on notice as well. When informed of her very first transfer, Jett told Superintendent Brock that he was discriminating against her and threatened to file a lawsuit against him. The Eleventh Circuit addressed both these facts in its opinion. In fact, the court specifically distinguished *Sturniolo v. Shaeffer, Eaton, Inc.*, 15 F.3d 1023 (11th Cir. 1994), which Jett now cites to this Court to support her current position. (Eleventh Circuit Opinion in Jett's Petition at A-8 to A-9).

Second, the Eleventh Circuit's opinion does not conflict with *Zipes*, but comports with it. There, this Court held that the filing of a timely charge of discrimination is not a jurisdictional prerequisite to the maintenance of a lawsuit, but a requirement subject to waiver, estoppel and equitable tolling. *Zipes*, 455 U.S. at 393, 102 S.Ct. at 1132. The Eleventh Circuit determination that Jett's claims were not equitably tolled does not conflict with this holding. Jett was afforded the opportunity to argue the issue of equitable tolling in an attempt to save her time-barred claims. She simply did not prevail in that argument.

Third, Jett's argument to this Court is apparently that the Eleventh Circuit misapprehended "a series of disputed facts." (Jett's Petition at 14). The Eleventh Circuit addressed Jett's equitable tolling claim at some length. Jett's Petition contains a large paragraph in which she attempts to convince this Court that the Eleventh Circuit was wrong when it determined that the facts did not support a determination that equitable tolling saved Jett's time-barred claims. (*Id.* at 14-15). This is merely an attempt to have this Court reach a different result under the same rule of law. However, Supreme Court Rule 10

specifically states that this Court rarely grants certiorari when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. The Court should apply that rule to this case and deny certiorari.

Fourth, Jett misconstrues several circuit court opinions that cite to *Zipes* to reinforce her assertion that she could not reasonably have asserted her rights following her transfers. This lies in contravention of Jett's statement to Superintendent Brock and the Eleventh Circuit's factual determination. (Eleventh Circuit Opinion in Jett's Petition at A-5, A-9). Jett also makes the anomalous assertion that the School Board's position that Jett's transfers were not adverse employment actions supports Jett's current argument for equitable tolling because Jett had no claim for her transfers and could not be on notice to file a discrimination charge. If Jett is arguing that the School Board's adoption of the above position establishes equitable tolling in Jett's favor, the School Board disagrees. Jett has cited no case to support this proposition, which would deprive the School Board of its right to make Jett prove that her transfers were adverse employment actions. On the other hand, if Jett is arguing that her transfers were not adverse employment actions, she will find no opposition in this brief.

Fifth, Jett argues that when facts are in dispute, a determination of when the statute of limitations begins to run is for the jury. This is true with regard to virtually all subjects. Conversely, when the facts are not in dispute, a party may be entitled to summary judgment. Here, the undisputed facts enumerated that Jett inexcusably failed to file a charge of discrimination with the appropriate

state agency after personally being put on notice of a potential claim. (Eleventh Circuit Opinion in Jett's Petition at A-8 to A-9). Summary judgment was appropriate.

In summary, the opinion below does not conflict with *Evans* or *Zipes*. The doctrines of continuous violation and equitable tolling were applied in accordance with those cases. Jett simply does not like the result. This Court should not take certiorari to revisit the application of the facts of this case to those doctrines.

III.

THE ELEVENTH CIRCUIT'S OPINION DOES NOT CONFLICT WITH CASE LAW OF THIS COURT REGARDING POST-VERDICT APPELLATE DETERMINATIONS OF WHETHER A PLAINTIFF HAS ESTABLISHED HER PRIMA FACIE CASE.

Jett next argues that this Court should take certiorari review because, pursuant to case law from this Court, the Eleventh Circuit should not have assessed whether Jett had established a prima facie case of discrimination regarding the commensurate salary policy after Jett prevailed at a trial upon the merits. This Court should deny certiorari review of this argument for several reasons.

First, Jett did not raise this argument to the appellate court. The School Board's initial brief to the Eleventh Circuit argued that Jett failed to establish a prima facie case as to both her transfers and the commensurate salary policy. In response, Jett did *not* argue to the Eleventh Circuit that it was improper for the Eleventh Circuit to inquire into the adequacy of her prima facie case. This Court does not decide questions not raised or resolved in

lower courts. *Youakim v. Miller*, 425 U.S. 231, 234, 96 S.Ct. 1399, 1401, 47 L.Ed.2d 701 (1976). This principle helps to maintain the integrity of the process of certiorari. *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646, 112 S.Ct. 1644, 1649, 118 L.Ed.2d 280 (1992). Because Jett did not raise this argument below, this Court should refuse to entertain it now.

Second, even if Jett is correct that the appellate court should not have reviewed the sufficiency of her prima facie case, this affords her no relief because the court also determined that Jett did not prove that the School Board's legitimate reason for enacting the policy was a mere pretext for intentional discrimination. In other words, even if the prima facie case should not be reviewed on appeal (but should be presumed established), Jett's claim regarding the commensurate salary policy still fails for lack of proof of pretext. The Eleventh Circuit noted this. (Eleventh Circuit Opinion in Jett's Petition at A-10 to A-11).

Third, the opinion below does not conflict with *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983). There, the Court expressed "surprise" upon finding out that the court of appeals addressed whether Aikens established a prima facie case after he prevailed at a trial upon the merits. *Aikens*, 460 U.S. at 714, 103 S.Ct. at 1481. At that point, the appellate court should have concerned itself with whether discrimination was ultimately proved by determining whether the plaintiff had directly proved a discriminatory reason for the adverse employment action or indirectly proved discrimination by showing the employer's proffered reason to be unworthy of credence.

Aikens, 460 U.S. at 716, 103 S.Ct. at 1482. In the instant case, even though the Eleventh Circuit addressed Jett's prima facie case, it also specifically addressed the ultimate determination of discrimination – it specifically held that Jett failed to prove that the School Board's proffered reason for the policy was a pretext for discrimination.[3] Thus, the Eleventh Circuit did precisely what *Aikens* tells it to do.

Fourth, the opinion in this case does not conflict with *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). Jett is correct that *Reeves* held that a plaintiff's prima facie case, combined with sufficient evidence that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated. *Reeves*, 530 U.S. at 148, 120 S.Ct. at 2109. Though it did not cite *Reeves* in its opinion, the Eleventh Circuit expressly considered this. In fact, the court determined that Jett failed to admit evidence that the School Board's asserted justification for the commensurate salary was false. Thus, not only is there no conflict between the opinion below and *Reeves*, Jett's claim fails under the *Reeves* language.

Jett also argues that the Eleventh Circuit violated *Reeves* because *Reeves* mentioned that an appellate court reviewing the denial of a Rule 50(b) motion must examine the record evidence in the light most favorable to the nonmovant. (Jett's Petition at 17). There is no evidence that the Eleventh Circuit did not do that. In fact, the court

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[3] Direct proof of discrimination was not an issue in this case.

expressly noted its requirement to do so. (Eleventh Circuit Opinion in Jett's Petition at A-7). There is no conflict with *Reeves* on this basis – Jett simply does not like the result reached under the appropriate test for reviewing a Rule 50(b) motion. With no conflict, this Court should decline to grant certiorari because Jett is merely arguing that the Eleventh Circuit made erroneous factual findings or misapplied a properly stated rule of law.

In summary, this argument is previously unraised and without merit. The Eleventh Circuit followed the law set forth in both *Aikens* and *Reeves*. No conflict exists. Jett is simply arguing that the wrong result was reached under the proper rules of law. Accordingly, Jett's Petition should be denied.

CONCLUSION

Based upon the foregoing, Respondent School Board of Washington County, Florida respectfully requests this Honorable Court deny the Petition.

Respectfully Submitted,

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